SECURITIES AND EXCHANGE COMMISSION
Washington, D.C.

SECURITIES ACT OF 1933
Release No. 10389 / July 13, 2017

SECURITIES EXCHANGE ACT OF 1934
Release No. 81143 / July 13, 2017

Admin. Proc. File No. 3-16178

In the Matter of

JOSEPH C. RUGGIERI

ORDER DISMISSING PROCEEDINGS

The Order Instituting Proceedings ("OIP") in this matter alleged that Joseph Ruggieri traded while in possession of material nonpublic information on six occasions between April 2010 and March 2011. An administrative law judge dismissed the proceeding, and the Division of Enforcement appealed only with respect to four of the six trades at issue in the OIP. The Commission is evenly divided as to whether the allegations in the OIP with respect to those four trades have been established. Accordingly, it is ORDERED that the proceeding instituted against Joseph Ruggieri be, and it hereby is, dismissed.[1]

By the Commission (Commissioner STEIN against dismissal; Commissioner PIWOWAR for dismissal).

Brent J. Fields
Secretary

[1] *See* Commission Rule of Practice 411(f), 17 C.F.R. § 201.411(f); *Jeffrey Steinberg*, Exchange Act Release No. 51979, 2005 WL 1584969 (July 6, 2005) (dismissing proceeding by an evenly divided Commission). The Division's request for oral argument is denied.

OPINION OF COMMISSIONER STEIN:

Having conducted a review of the record, I believe that there is sufficient evidence to establish, by a preponderance of the evidence that Ruggieri traded while aware of material nonpublic information on at least one occasion. The Division of Enforcement is not required to prove that Ruggieri engaged in insider trading on every possible occasion or on every type of potential material information, merely that he did so on at least one occasion. Nor must the Division show that the tipper tipped every possible person, who then in turn also traded on the material non-public information. Having looked at all of the circumstances related to the trades at issue, including the uncanny timing of Ruggieri's profitable trades, his trading history, the expert analysis, Ruggieri's communications, and his explanations for the trades, I believe that the Division has met its burden of proving by a preponderance of the evidence that Ruggieri traded while aware of material nonpublic information.

OPINION OF COMMISSION PIWOWAR:

The Division of Enforcement appeals from the initial decision of an administrative law judge dismissing proceedings against Joseph Ruggieri, a former trader at Wells Fargo Securities ("Wells Fargo"), for allegedly trading while aware of material, nonpublic information in violation of antifraud provisions of the securities laws.[1] Having conducted a *de novo* review of the record, I agree with Ruggieri that the evidence is insufficient to establish that he traded while aware of material nonpublic information and therefore that the proceeding should be dismissed.

## I. Background

Ruggieri was a Wells Fargo trader of healthcare sector stocks who knew and worked closely with Gregory Bolan, a Wells Fargo analyst of those stocks. The Division alleges that Bolan tipped Ruggieri shortly before Wells Fargo published research reports Bolan wrote in which he changed his analyst ratings ("Rating Changes").[2] According to the Division, Bolan tipped Ruggieri so Ruggieri could take positions in the stocks and Wells Fargo could profit from anticipated price movements once the Rating Changes were published.

The Division's appeal focuses on four trades Ruggieri executed during 2010 and 2011 in a principal capacity in Wells Fargo's proprietary account.[3] "Principal transactions" are those "in which the broker-dealer buys or sells for [its] own account and seeks to realize through sales at prices above [its] cost a profit which will compensate [it] for [its] risk and/or [its] services."[4] Ruggieri's trades were in securities issued by Albany Molecular Research Inc. (AMRI), Emdeon Inc. (former ticker EM), Athenahealth, Inc. (ATHN), and Bruker Corporation (BRKR). At the hearing, the Division introduced evidence that, for these trades, Ruggieri took positions in these stocks and held them overnight, while the markets were closed, before Wells Fargo published Bolan's Rating Changes. Following publication, Ruggieri unwound the positions, generating for Wells Fargo total profits of approximately $75,000.

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1 *See Joseph C. Ruggieri*, Initial Decision Release No. 877, 2015 WL 5316569 (Sept. 14, 2015).

2 Rating Changes refers to Bolan's research reports changing his recommendation about a security (*e.g.*, buy, neutral, sell), as well as those research reports initiating coverage of a security with a buy or sell rating. Bolan also published other types of research reports, including Earning Changes (those changing his estimates of an issuer's future earnings) and Valuation Changes (those changing his estimates of the valuation at which the security was likely to trade), both of which are discussed below.

3 The law judge dismissed allegations of insider trading with respect to two other trades, and the Division of Enforcement has not appealed that aspect of the law judge's decision.

4 *C.A. Benson & Co.*, Exchange Act Release No. 7346, 1964 WL 66883, at *2 (June 15, 1964) (describing the difference between principal transactions and "agency transactions, in which the broker-dealer acts on the customer's behalf to effect the transaction in the market at a designated market price or at the best price obtainable and charges the customer a commission for [its] services in effecting the transaction").

## II. Analysis

The Division has the burden of demonstrating a violation of the securities laws, including each element of the violation, by a preponderance of the evidence.[5] Liability for a tippee like Ruggieri requires proof, among other things, "that (1) the tipper breached a duty [to the owner of confidential information] by tipping [that] confidential information; (2) the tippee knew or had reason to know that the tipper improperly obtained the information (*i.e.*, that the information was obtained through the tipper's breach); and (3) the tippee, while in knowing possession of the material non-public information, used the information by trading or by tipping for his own benefit."[6] Circumstantial evidence is sufficient to establish the existence of a tip.[7]

Based on a review of the evidence, I conclude that under the facts and circumstances of this case the Division has not met its burden of establishing that Bolan tipped Ruggieri.

### A. The telephone records are inconclusive.

The Division argues that Bolan, who worked in a different city from Ruggieri, tipped Ruggieri during contemporaneous phone conversations. The telephone records the Division introduced in support of this theory show that calls were placed between a phone associated with Bolan and another associated with Ruggieri in the hours or days before publication of the relevant Rating Changes, and that they preceded the trades at issues. Evidence of phone calls followed by trades may reasonably permit an inference that material nonpublic information was conveyed on the calls.[8] However, such evidence does not necessarily compel that inference.

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5 *See Steadman v. SEC*, 450 U.S. 91, 101-04 (1981).

6 *SEC v. Obus*, 693 F.3d 276, 289 (2d Cir. 2012); *see also* 17 C.F.R. § 240.10b5-1(b) (defining "a purchase or sale of a security of an issuer" as being "'on the basis of' material nonpublic information about that security or issuer if the person making the purchase or sale was aware of the material nonpublic information when the person made the purchase or sale").

7 *See, e.g., SEC v. Sargent*, 229 F.3d 68, 75 (1st Cir. 2000) (explaining that to establish the existence of a tip, "'circumstantial evidence, if it meets all the other criteria of admissibility, is just as appropriate as direct evidence and is entitled to be given whatever weight the [fact finder] deems it should be given under the circumstances within which it unfolds'") (quoting *United States v. Gamache*, 156 F.3d 1, 8 (1st Cir. 1998)); *see also* 4 Alan R. Bromberg *et al.*, *Bromberg & Lowenfels on Securities Fraud* § 6:512 (2d ed., updated June 2016) (stating that a tip is "the selective disclosure of [material nonpublic information] for trading or other personal purposes").

8 *See SEC v. Ginsburg*, 362 F.3d 1292, 1301 (11th Cir. 2004) (finding that repeated calls from alleged tipper to his brother and father followed by brother's and father's trades were sufficient to permit the jury to infer that material nonpublic information was conveyed on the calls).

Other facts may weigh against such an inference when a factfinder considers the totality of the circumstances.[9]

Here, the telephone records showing calls between Bolan's phone and Ruggieri's phone prior to the relevant trades are consistent with Bolan tipping Ruggieri. However, there is also contrary evidence. Bolan and Ruggieri talked almost every day during the year and a half that they overlapped while at Wells Fargo, in accordance with Wells Fargo policy that encouraged active communication between traders and analysts. Thus, phone calls occurring before a trade would not have been unusual. Further, on at least some of the relevant days, contemporaneous emails suggest that Bolan and Ruggieri likely talked about matters other than the Rating Changes. Nor is there any evidence (such as testimony from co-workers) to suggest that Ruggieri was evasive or suspicious while on the phone with Bolan even though Ruggieri and his colleagues sat in close proximity in an open floorplan office. Indeed, there is no proof that Bolan and Ruggieri actually spoke during the calls reflected in the telephone records because other Wells Fargo traders typically answered Ruggieri's phone when he was not at his desk.

**B. The statistical evidence is not conclusive.**

The Division relies on an expert and his statistical evidence to infer that Bolan tipped Ruggieri during phone conversations they had around the time of the four trades in question. The expert analyzed the likelihood that Ruggieri's trades in the days preceding the Rating Changes were a coincidence. He assumed that, because Bolan published research reports on 205 stocks during a 12-month period and Ruggieri held overnight positions in 18 stocks on the same nights the reports were published, an overnight trade by Ruggieri ahead of Bolan's research reports would occur by coincidence about 8.78% of the time. Because Ruggieri traded ahead of Bolan's Rating Changes 6 out of 8 times, or 75% of the time, the Division's expert "opine[d] that the overnight positions in the stocks with ratings changes are not simply by chance."

During the 12-month period the expert analyzed, Bolan published research with potentially market moving information—a Rating Change, Earning Change, or Valuation Change—on 71 occasions. However, the expert focused on only the 8 Rating Changes. When asked about these exclusions during his testimony, the expert responded that the Rating Changes he included were "stronger" or "more important piece[s] of information" than the Valuation Changes and Estimate Changes he excluded. The expert conceded at the hearing that had he considered the Earnings Changes and Valuation Changes, his analysis might not show as "stark of a difference." When Bolan's reports regarding Valuation and Estimate Changes are included in the analysis, Ruggieri's pattern of trading is statistically indistinguishable from trading by

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[9] *See, e.g.*, *SEC v. Schvacho*, 991 F. Supp. 2d 1284, 1299 (N.D. Ga. 2014) (finding evidence that communications between alleged tipper and alleged tippee occurred in close proximity to alleged tippee's trades did not "meet the SEC's burden of proof in this case" where the evidence established that the alleged tipper and alleged tippee spoke "with unusual frequency") (citing *SEC v. Rorech*, 720 F. Supp. 2d 367, 410 (S.D.N.Y. 2010)).

coincidence—trading ahead 6 out of 71 times, or 8.45% of the time, and is not inconsistent with the expert's assumption that such trading would occur by coincidence 8.78% of the time.

**C. The remaining evidence is insufficient.**

The Division also focuses on evidence besides the phone records and statistical analysis. For example, evidence showed that a former colleague of Bolan's, Josh Moskowitz, also traded ahead of two of the four Rating Changes at issue in this appeal, suggesting that Bolan tipped him. Such trading by Moskowitz is relevant because evidence that one person traded after being tipped may support an inference that another person who made similar trades was also tipped.[10] Moskowitz, however, passed away prior to the institution of these proceedings, and was never charged with insider trading. Nor did Moskowitz ever testify regarding, or otherwise provide evidence supporting, the allegations against Bolan and Ruggieri.[11]

In any event, regardless of whether Bolan tipped Moskowitz, Moskowitz's and Ruggieri's situations were very different. Moskowitz and Bolan were close friends. Moskowitz never worked at Wells Fargo, and he traded in his personal brokerage account, which was not with Wells Fargo. Moskowitz also apparently suffered from a debilitating illness, and was unemployed during the relevant period. The Division's theory is that Bolan tipped Moskowitz because Moskowitz was a sick friend that Bolan wished to assist, which differed from the Division's theory as to why Bolan tipped Ruggieri.

The Division's other circumstantial evidence is inconclusive. According to the Division, the existence of a tip may be inferred because Ruggieri's bonus was tied to the profits he generated for Wells Fargo. However, Ruggieri's incentive to make profitable trades does not establish that Bolan tipped him. The Division also argues that a tip may be inferred from Bolan's incentive to tip in exchange for positive performance evaluations from Ruggieri. However, the Division has not suggested that Bolan tipped other traders who gave him positive evaluations (such as Ruggieri's predecessor at Wells Fargo) or other colleagues who were in a position to do so—or otherwise explained why Bolan's incentive was unique as to Ruggieri.[12]

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[10] *See SEC v. Warde*, 151 F.3d 42, 48 (2d Cir. 1998) (holding that the "parallel trading" of a tipper and tippee, in connection with other evidence, "support[ed] th[e] inference" that the tipper disclosed material nonpublic information to the tippee).

[11] Bolan settled the insider trading charges brought against him on a no-admit-or-deny basis, including with respect to allegations that he tipped Moskowitz. However, that settlement provided that its findings "are not binding on any other person . . . in this or any other proceeding," and thus could not be used in the case against Ruggieri. *See Mohammed Riad*, Advisers Act Release No. 4420, 2016 WL 3226836, at *16 n.32 (June 13, 2016) (noting that "our findings here are based solely on the record adduced before the ALJ in this proceeding," and not on an order accepting third parties' offers of settlement).

[12] The Division also introduced evidence that Wells Fargo reprimanded Bolan for sharing nonpublic information with a journalist and a client, and ultimately terminated him after a client

(*continued . . .*)

Finally, the Division argues that the supposed implausibility of Ruggieri's explanations for his trades support a finding that he was tipped. Courts have held that a respondent's implausible explanations for his trades may, together with other facts, be sufficient to infer that the respondent was tipped with material non-public information.[13] However, I do not find Ruggieri's explanations for his trades to be so implausible on their face as to raise an inference of a tip given the nature of the other evidence.

* * *

In sum, while certain evidence is consistent with the Division's allegations against Ruggieri, there is also countervailing evidence. Given the record as a whole, and after considering the evidence in its totality, I conclude that the Division has not demonstrated by a preponderance of the evidence that Bolan provided nonpublic information to Ruggieri in connection with these four trades.

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(*continued . . .*)
complained to Wells Fargo about him doing so. The record, however, does not contain any evidence suggesting that Bolan's termination was in any way related to insider trading.

[13] *See, e.g., SEC v. Michel*, 521 F. Supp. 2d 795, 824 (N.D. Ill. 2007) (stating that the "suspicious timing of amounts of the [stock] purchases and the evasive testimony of [the defendant] and the other witnesses gives rise to a reasonable inference that they possessed non-public information about the [stock]"); *SEC v. Singer*, 786 F. Supp. 1158, 1164-65 (S.D.N.Y. 1992) (stating that "circumstantial evidence such as suspicious timing of trades, contacts between potential tippers and tippees, and incredible reasons for such trades provide an adequate basis for inferring that tipping activity has occurred").